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IN THE

Supreme Court of the United States  
OCTOBER TERM, 1950

No. 13, Original

UNITED STATES OF AMERICA,

*Plaintiff*

v.

STATE OF TEXAS,

*Defendant*

OBJECTIONS TO THE DECREE PROPOSED BY THE  
UNITED STATES AND MEMORANDUM IN  
SUPPORT OF OBJECTIONS

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IN THE  
**Supreme Court of the United States**  
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No. 13, Original

UNITED STATES OF AMERICA,  
*Plaintiff*  
*v.*

STATE OF TEXAS  
*Defendant*

**OBJECTIONS TO DECREE PROPOSED BY THE  
UNITED STATES**

Subject to the Court's action on the petition for rehearing this day filed, the State of Texas makes the following objections to the entering of the decree proposed by plaintiff:

1. It objects to that part of paragraph 2 enjoining the State of Texas and others from carrying on certain activities in an area not yet defined with sufficient definiteness.
2. It objects to that part of paragraph 2 of the proposed decree enjoining defendant's "lessees and other persons claiming under it" from carrying on activities in the area under leases issued prior to the filing of this suit because:
  - a. They are not parties to this suit.
  - b. Stoppage of this production of oil would be against public policy and detrimental to the best interests of the State and Nation.

3. It objects to that part of paragraph 3 fixing the beginning date of the State's accounting as June 23, 1947, instead of the date of the Court's decision, June 5, 1950, or, in the alternative, the date the Complaint was filed, May 16, 1949.

4. It objects to the wording of paragraph 3 because it does not clearly state that the existence and extent of Texas' liability, if any, for money received is yet to be determined and does not provide the means for such determination.

**MEMORANDUM IN SUPPORT OF OBJECTIONS  
TO PROPOSED DECREE**

Pending before the Court is defendant's petition for rehearing, directed to the Court's opinion as amended by its order of October 16, 1950. By its amendments to the original opinion of June 5, 1950, the Court has based its entire decision upon one clause in the unilateral act of the United States Congress formally admitting Texas to the Union in accordance with "proposals, conditions, and guarantees" theretofore agreed upon by the two nations. In doing so, defendant respectfully urges that the Court erred in disregarding the specific "proposals, conditions, and guarantees" previously agreed upon, one of which was the provision that the new State "shall retain all vacant and unappropriated lands lying within its limits." Defendant further urges that the Court erred in denying Texas the opportunity to present evidence proving the allegations of its affirmative pleading that by such specific annexation "proposals, conditions and guarantees" and the formal act of admission the parties intended

that the lands in controversy were not to pass to the United States but were to be retained by the State of Texas.

The nature of the errors presented makes particularly inappropriate the entry of any decree until the Court has acted on the petition for rehearing and permitted full development of the case on the merits. Thereafter, it is earnestly believed that there will be no necessity for the type of decree proposed by plaintiff.

Subject to the Court's action on the pending petition for rehearing and only in the event the petition is overruled, the State of Texas makes the following objections to the proposed decree:

1. **An injunction should not issue before the area in which the injunction is to be operative has been clearly defined.**

Paragraph 2 of the proposed decree would enjoin defendants and others from carrying on certain activities "upon or in the submerged area described in paragraph 1 hereof." The area described in paragraph 1 includes the lands

"... lying seaward of the ordinary low-water mark on the coast of Texas, and outside of the inland waters, extending seaward to the outer edge of the continental shelf and bounded on the east and southwest, respectively, by the eastern boundary of the State of Texas and the boundary between the United States and Mexico."

Plaintiff has yet to indicate its position in this case with respect to the criteria to be adopted for

ascertaining "the ordinary low-water mark" on the coast of Texas and in determining what waters are inland waters. The difficulties surrounding such a determination are indicated in the *California* case, where no segment of the line of demarcation along the California coast has been determined, although the opinion in that case was handed down on June 23, 1947.

No injunction should be granted until the Court has delineated the boundary line between the lands beneath bays and other inland waters and those beneath the marginal sea. Until that line has been established by a decree of this Court, defendant cannot know whether it will violate the injunction if it leases areas which it believes are beneath the inland waters and hence within its domain. Plaintiff recognizes that problems may arise in defining the line between the marginal belt and inland waters.<sup>1</sup> However, defendant disagrees with plaintiff's view that "there is no present necessity" to determine with greater definiteness any particular segments of the boundary of the area in controversy. Along a large extent of the Texas coast, for example from the mouth of the Rio Grande to Matagorda Bay, Texas contends that the low-water mark for measuring the marginal sea is not on the mainland but on the off-lying islands and shoals. Several proven mineral deposits extend beneath the mouths of the open bays and into the adjacent Gulf while others lie beneath the tideland beaches and the adjacent Gulf. State leases on these areas embrace both lands which be-

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<sup>1</sup> Plaintiff's Memorandum in Support of Proposed Decree, p. 6.

long to the State and lands which are now held to be subject to the paramount rights of the United States.

Definitive location of the line of inland waters is necessary to determine the areas on which the State may continue its operations and make future leases without risking violation of the injunction plaintiff seeks.

The State still owns a tideland belt of considerable width above low-water mark along the entire gently sloping Texas coast, much of which is included within existing leases and much of which will be included in future leases. The line of demarcation between this land and the marginal belt area to be covered by an injunction should be fixed before any injunction issues.

This is in line with the rule that no injunction should issue which is so indefinite that the defendant cannot tell whether it is obeying or violating the writ. "An injunction should be so clear and certain in its terms that defendant may readily know what he is restrained from doing." 43 C.J.S. 932, Injunctions, Sec. 206(b) and cases cited therein.

For this reason among others, specific injunctive relief was not sought, or granted, in the *California* case, where an analogous problem exists. Paragraph 2 of the decree in the *California* case simply reads as follows:

"The United States is entitled to the injunctive relief prayed for in its complaint."

It is respectfully urged that paragraph 2 of the proposed decree should be stricken or reworded so

as to provide that, though the United States may be entitled to injunctive relief, an injunction will issue only after the low-water mark and the line of inland waters shall have been defined by agreement or by further proceedings for that purpose.

**2. Lessees and other persons not parties to this action should not be enjoined by this decree.**

Defendant objects to that part of paragraph 2 of the proposed decree which would enjoin defendant's "lessees and other persons claiming under it" from carrying on activities in the area under leases issued prior to the filing of this suit because:

- a. They are not parties to this suit.
- b. Stoppage of this production of oil would be against public policy and detrimental to the best interests of the State and Nation.

Plaintiff alleged in its petition that the State had executed leases to various persons and corporations who have paid the State substantial sums of money and entered upon the lands and drilled wells for the recovery of petroleum, gas, and other hydrocarbons. It is undisputed that all existing leases on the land in controversy were purchased and delivered to lessees more than a year prior to the filing of the complaint in this case. They were made prior to plaintiff's motion for leave to file the complaint and before the United States gave any notice whatever that it would assert title to the property.

*Lessees Are Not Parties to this Suit*

Although the names of the lessees were readily available to plaintiff, it did not join them as parties

to this action. Texas alone was named as defendant. No person other than the State was served with process, and none came otherwise before the Court.

Plaintiff now proposes that the Court enter a decree restraining the lessees from using their improvements placed upon the leases and from conducting operations upon the leases purchased from the State in good faith. This cannot be done, for the Court has no jurisdiction in this action to restrain the lessees, who are neither parties to this action nor "privies" of the State.

"The principle is as old as the law and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded." *Mason v. Eldred*, 6 Wall. 231, 239 (1868).

No court can directly adjudicate the rights of a person who is not before the court. *Barney v. City of Baltimore*, 6 Wall. 280 (1868); *Michoud v. Girod*, 4 How. 503 (1845); *Galpin v. Page*, 18 Wall. 350 (1874); *Keegan v. Humble Oil & Refining Co.*, 155 F. 2d 971 (C.C.A. 5th 1946); *Boynton v. Moffat Tunnel Improvement Dist.*, 57 F. 2d 772 (C.C.A. 10th 1932), cert. den. 287 U.S. 620; *Ducker v. Butler*, 104 F. 2d 236 (App. D.C. 1939); *Alemite Mfg. Corp. v. Staff*, 42 F. 2d 832 (C.C.A. 2d 1930). As said in *Gregory v. Stetson*, 133 U.S. 579, 586 (1890):

"It is an elementary principle that a court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. This principle is fundamental."

In this case the lessees are not before the Court, and, therefore, have not had their day in court. Nor are they in "privity" with the State as that term is commonly used in stating the rule that a judgment is conclusive and binding not only on the parties to the action but also on persons who are in privity with them. The rule applies only to persons acquiring rights subsequent to the institution of the suit. *Dull v. Blackman*, 169 U.S. 243 (1898); *Carroll v. Goldschmidt*, 83 F. 508 (C.C.A. 2d 1879), cert. den. 169 U.S. 735; *Boulter v. Commercial Standard Ins. Co.*, 175 F. 2d 763 (C.C.A. 9th 1949); *National Lead Co. v. Nulsen*, 131 F. 2d 51 (C.C.A. 8th 1942), cert. den. 318 U.S. 758; *General Chemical Co. v. Standard Wholesale Phosphate & Acid Works*, 101 F. 2d 178 (C.C.A. 4th 1939); 1 *Freeman on Judgments* (5th ed. 1925) 966-969, Sec. 440; 2 *Black on Judgments* (1902) 832; 30 *Am. Jur.* 958-959, Judgments, Secs. 225-226.

In *Dull v. Blackman*, *supra*, the Court quoted with approval the following excerpt from *Freeman on Judgments*:

"It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected, occurred previously to the institution of the suit. A tenant in possession prior to the commencement of an action of ejectment cannot, therefore, be lawfully dispossessed by the judgment unless made a party to the suit...."

169 U.S. at 248.

It concluded:

"We remark again that while a judgment or decree binds not merely the party or parties subject to the jurisdiction of the Court but also those in privity with them, yet that rule does not avail the plaintiffs in error, for Phelan acquired his rights prior to the institution of the suit in New York and was therefore not privy to that judgment." 169 U.S. at 348.

In *Doctor Jack Pot Mining Co. v. Marsh*, 216 Fed. 261 (D. Colo. 1914), an action for damages for trespass, defendants moved to strike allegations in the complaint to the effect that in 1909 plaintiff filed in that court an action against defendants' lessor wherein plaintiff was declared to be the owner of the property in question and that defendants as lessees of that company were bound by the previous judgment. The facts showed that defendants entered as lessees of the company prior to the institution of the previous suit. In sustaining the motion to strike, the court quoted with approval from 2 *Black on Judgments* 832-833 (1902), as follows:

"... privies, in such sense that they are bound by the judgment, are those who acquired an interest in the subject-matter after the rendition of the judgment; if their title or interest attached before that fact, they are not bound unless made parties." 216 Fed. at 263.

The lessees of the State, all of whom acquired their leases prior to the institution of this action, are, therefore, not in privity with the State and are not properly subject to any injunction which the Court might issue at this time.

Even in those cases where parties are named in the petition for injunction, they are not bound by the decree unless they were served with process. *Hitchman Coal Co. v. Mitchell*, 245 U.S. 229, 234 (1917); *Chase National Bank v. Norwalk*, 291 U.S. 431, 437 (1934); *Scott v. Donald*, 165 U.S. 107, 117 (1897). In the latter case, the Court said: "The decree is also objectionable because it enjoins persons not parties to the suit." 165 U.S. at 117.

*Stoppage of Production from Existing Wells Would  
Be Against Public Policy and Detrimental to  
the Best Interests of the State and Nation*

The issuance of an injunction by a court of equity is a matter of discretion. *Yakus v. United States*, 321 U.S. 414, 440-441 (1944); *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 10-11 (1942); *Virginia Ry. v. American Federation of Labor*, 300 U.S. 515, 552 (1937); *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935); *Harrisonville v. Dickey Clay Co.*, 289 U.S. 334, 338 (1933). Where public interest would be adversely affected, the courts generally do not grant an injunction. "Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginia Ry. v. American Federation of Labor*, *supra*, quoted with approval in *Yakus v. United States*, *supra*.

In the present case, the public interest would be harmed by the granting of an injunction preventing

the lessees of the State from continuing their production from wells already drilled, just as it was against the public interest to stop the production of California's lessees in the *California* case.

As stated in the stipulations entered into between the Federal Government and the State of California after the decision in the *California* case:

“ . . . it is in the mutual interest of the parties and of the general public, pending the establishment of a line of demarcation, that the production of oil or gas from wells now in production shall continue and not be interrupted, and also that new wells be drilled in said tide and submerged lands wherever necessary to prevent drainage by wells drilled in other lands, or to protect the respective interests of either of the parties hereto. . . . ”<sup>3</sup>

In explaining the situation to the President, Attorney General Clark wrote:

“The opinion of the Supreme Court last June gave rise to a variety of unusually complex problems. The most pressing of these was the urgent need of assuring continued oil production in the coastal waters off California. Continued oil production was necessary in the interest of the United States, inasmuch as the closing down of the wells would have resulted in seepage, loss of the oil and damage to wells and equipment. There was also a shortage of petroleum products, and oil producers generally were being urged by the Government to make every

<sup>3</sup> Appendix B, Decree Proposed by the United States, p. 13, United States v. California.

effort to increase production for military as well as civilian purposes.”\*

No injunction has yet been issued by this Court against California or its lessees because of this great public interest in the continuation of oil production from existing wells on State leases.

Until such time as Congress gives the appropriate entity the authority to lease and develop the submerged lands off the coast of Texas, the production of oil from these lands should not be interrupted at a time when a national emergency might require the availability on short notice of all the nation's oil potential. If production from the wells is stopped, it will mean in some cases the complete loss of this potential until such time as new wells may be drilled. Some wells cannot be shut down indefinitely and then reopened. This stoppage and possible loss of some of the present wells would be detrimental to both the State and Nation.

The denial of an injunction at the present time and until Congress acts, or intervening circumstances warrant, would be in keeping with the reasoning on which the Court has based its opinions in the *California*, *Texas*, and *Louisiana* decisions. The continuing production from these wells would not hamper the United States in its conduct of national

\* Letter from Attorney General Tom C. Clark to President Truman, October 30, 1947. Supplemental Statement and Brief for the State of Texas in Support of Objections to Motion of the United States for Leave to File Complaint, p. 33.

defense or foreign affairs but would more likely be of aid should a more serious international emergency develop.

As has been recognized by federal officials, there is no agency of the government which is authorized to take over the development of these lands. In the stipulation between the United States and California, pursuant to the opinion in *United States v. California*, it was stated:

“The President recognizes that in event the decision of this Court is favorable to the United States, it will be necessary to have Congressional action looking towards the future management of the resources of this area.”<sup>5</sup>

The Department of Interior has determined that the mineral leasing act does not give the Department authority to lease submerged lands. (Opinion of the Department of Interior, of August 8, 1947). This opinion was concurred in by a letter opinion of the Attorney General dated August 29, 1947.

It is therefore respectfully submitted that if any injunction issues, it should not include the State's lessees, who are producing under leases granted prior to the filing of this suit, because (a) they are not parties to the suit, and (b) stoppage of production from existing wells would be against public policy and detrimental to the best interests of the State and Nation.

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<sup>5</sup> Appendix B, Decree Proposed by the United States, p. 14, *United States v. California*.

3. The period of accounting should date from the decision in *United States v. Texas*, June 5, 1950, or, in the alternative, from the date the complaint was filed, May 16, 1949.

Paragraph 3 of the proposed decree provides that the United States is entitled to an accounting from the State of Texas "of all or any part of the sums of money derived by the State from the area described in paragraph 1 hereof subsequent to June 23, 1947."

By choosing the date of June 23, 1947, plaintiff admits that it is not entitled to an accounting dating from the entry of Texas into the Union. The reason that no such claim for an accounting could be successfully advanced is made clear by the following statement by this Court in *McKnight v. Taylor*, 1 How. 161, 168 (1843):

"In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost. The rule upon this subject must be considered as settled by the decision of this court in the case of *Piatt v. Vattier*, 9 Peters, 416; and that nothing can call a court of chancery into activity but conscience, good faith, and reasonable diligence; and where these are wanting, the court is passive and does nothing; and therefore, from the beginning of equity jurisdiction, there was always a limitation of suit in that court."

That this rule would be applicable to an action by the United States in a court of equity is shown by *Walker v. United States*, 139 Fed. 409, 412 (C.C.M. D. Ala. 1905), where the Court said:

“It is conceded that the money the government now seeks to recover by its counterclaim was illegally paid out, that the United States cannot be defeated or barred of its rights by the mere laches of its agents, that it cannot be estopped by the unauthorized acts of its accounting officers, that it is not subject to the statute of limitations, and that the unauthorized acts of his agents never bind the sovereign. It is, however, equally true, when the sovereign becomes an actor in a court of justice, especially in an action which proceeds on equitable principles, that his rights must be determined upon those fixed principles of justice which govern between man and man in like situation, and that the sovereign will be bound, as an individual would be, by his own acts, or by (what is the same thing) acts of his agents lawfully done within the purview of the authority he commits to them.”

This rule was recognized by the United States in the *California* case where plaintiff sought no accounting from the State of California prior to the date of this Court's decision in that case. By the same token, the date of the decision in the present case, June 5, 1950, should be the beginning date of accounting.

The government takes the position that the *California* decision in 1947 was sufficient notice to the State of Texas of the rights of the United States as against Texas in this area. No authority is cited in

support of the proposition nor could any be cited, for there is no case holding that an accounting will begin from the time of a decree in another case to which defendant was not a party or in any way bound by the decree.

The opinion of this Court in *United States v. California* was not *res judicata* as to Texas, nor was it binding in any way on the rights of Texas so as to give notice to the State of the rights and powers of the United States in the submerged lands off the coast of Texas. The State of California had no interest in its marginal belt other than that which it acquired upon becoming a State. On the other hand, as recognized by this Court, Texas, as an independent nation, had full rights of ownership and sovereignty in and over the lands and minerals in the marginal belt within its seaward boundary at the time of its admission into the Union. The United States gained no interest in these lands and minerals except what it acquired from the Republic of Texas upon annexation.

That the decision in the *California* case was no notice as to Texas is further demonstrated by statements of leading officials of the United States.

Mr. Justice Clark, while Attorney General of the United States, testified that on the day he argued the *California* case in this Court, March 13, 1947, he handed the press a written statement as to other States which contained these words as to Texas:

“Whatever the decision of the Court may be in the *California* case it would not be decisive as to the rights of any other State. . . . Other

coastal States are on an entirely different footing.

" . . . Texas had been an independent nation, a republic, for ten years before joining the Union. As a republic it owned all of the lands within the boundaries, including the marginal sea commonly called tidelands. This area similar to that involved in the California case extended into the Gulf of Mexico and was under the sovereignty of Texas during the Republic and was retained by it under the provisions of the Act of Admission."

More than a year later, Mr. Justice Clark, while still Attorney General, continued to recognize the different status of Texas when he said that his department was still "studying" the matter of asserting title against Texas. He admitted that "Texas has a special defense. . . . I still feel that Texas has special rights."

The fact that the government waited a year and a half after the *California* decision to bring suit

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<sup>6</sup> Joint Hearings Before the Committees on the Judiciary on S. 1988 and Similar House Bills, 80th Cong., 2d Sess. 689 (1948).

Former Interior Secretary Harold L. Ickes said after the *California* decision:

"Parenthetically, Texas may have the legal right to its tidelands because it came into the Union voluntarily and as an independent country." Address over ABC Network, October 14, 1948.

The President himself said:

"Texas is in a class by itself; it entered the Union by Treaty." Speech at Austin, Texas, September 20, 1948.

<sup>7</sup> Joint Hearings Before the Committees on the Judiciary on S. 1988 and Similar House Bills, 80th Cong., 2d Sess. 616-617, 689 (1948).

against Texas indicates that it also had doubts as to the applicability of the *California* case to Texas. If the rights of the United States to the lands and minerals off the coast of Texas had been made clear by the *California* decision, as the government would now imply, there is no doubt that the United States would have filed its suit earlier against Texas or would have given the State notice that the United States regarded the submerged lands and minerals off the coast of Texas as its property and that it intended to hold the State accountable for all revenues received therefrom. Instead, no suit was filed and no notice given, and the State proceeded to grant leases in this area and collect the monies therefrom for its public school fund on a good faith belief in its title and in reliance upon the inaction of the United States.

The closely divided vote (4-3) by which this Court reached its decision attests the strength of the Texas claim and the reasonableness of the State's reliance upon it despite the *California* decision.—The majority opinion states:

“But there is a difference in this case which, Texas says, requires a different result. That difference is largely in the preadmission history of Texas.” 339 U.S. at 712.

It would be more inequitable and unfair to the State of Texas to require it to account from the date of the *California* opinion than it would have been to require California to account from the date the first Federal claims were asserted against that State in 1938. No claim was asserted against Texas until

this suit was filed. A precedent was set in the *California* case against requiring accounting prior to the date of the decision against that State. It should not be departed from in this case.

*If the date from which the accounting is to begin is not the date of the Court's opinion in this case, in no event should it be prior to May 16, 1949, the date of the filing of the complaint herein.*

As stated in 1 C.J.S., Accounting, Sec. 41b (2),

"A person in the adverse possession of property, but with the tacit consent and acquiescence of the owner who negligently delays to call him to account, is not bound to account for rents and profits beyond the filing of the bill for an accounting. . . ."

This rule has its origin in early English Chancery practice and has been recognized by this Court and other courts in this country. In 1 Maddock, *Chancery Practice* 91 (4th Am. Ed: 1932) the rule is stated as follows:

"With respect to the account ordered of rents and profits of estates, in these and similar cases, the rule appears to be, that where a man brings a bill in equity, in respect of a trust, and upon a mere equitable title, he will in equity recover the estate; but as upon a legal title no more than six years mesne profits are recoverable at law, so where an estate in trust is recovered in

equity, the account of rents and profits is not extended beyond six years; and under special circumstances the court will only decree an accounting of rents and profits for the time of filing the bill, as where defendant had no notice of plaintiff's title, nor had the deeds and writing in his custody, in which the plaintiff's title appeared, or where the title of the plaintiff appeared by deeds in a stranger's custody. So, where there hath been any default or laches in the plaintiff in not asserting his title sooner and he has lain by, the court has often thought fit to restrain it to the filing of the bill." (Emphasis supplied.)

Early English cases following this rule are *Edwards v. Morgan*, 1 M'Cle. 541 (1824); *Pettiward v. Prescott*, 7 Ves. 541 (1802); *Bowes v. East London Waterworks*, 3 Madd. 375 (1818); *Drummond v. Duke of St. Albans*, 5 Ves. 433 (1800).

One of the first cases in this country recognizing the rule is *Green v. Biddle*, 8 Wheat. 1, 78 (1823). In that case the Court cited with approval the statement of the rule by Maddock and thus indicated that in a proper case the Court would confine an inattentive plaintiff to the time of filing his bill.

In *Roosevelt v. Post*, 1 Edw. Ch. 579 (N.Y. 1833), the principal question was as to the period from which the account should commence. In dealing with this question the court said:

"I think it is the fair inference, from the facts stated by the master, that for the period of about twelve years, the defendants received the wharfage (being in the nature of an in-

corporeal hereditament) by virtue of their several ownerships of the contiguous lots of land, without any idea of accountability to the complainant; and this too, with the knowledge of the latter; and he asserting no right. Nor was there any fraud or attempt to conceal from him a knowledge of his rights. And there is no circumstance to show, that any portion of the wharfage was received in trust for the complainant or deemed to be so received either by him or any of the defendants.

"The defendants must be looked upon as enjoying this income or revenue among themselves adversely to any rights of the complainant; and tacitly by his consent and acquiescence. And in such cases, the rule appears to be well established in equity, that the party shall have no account beyond the filing of his bill. [Citations.]

"The present case clearly falls within the principle of those which, without reference to the statute of limitations, restricts the right of the party to an account for the period of time subsequent to the filing of his bill. These defendants may have received money to which they were not legally or equitably entitled: but they have been suffered to take it upon the supposition of the same belonging to them; and this supposition was induced by the long acquiescence or remissness of the party, who now, for the first time, asserts a claim. (The money may have been expended in a manner which it would not have been, had the defendants not supposed it to be their own; and there may be more hardship and injustice, from a variety of considerations, in compelling them to account and refund, than in leaving the negligent party to the

consequences of his own remissness." 1 Edw. Ch. at 581-583.

This Court, in *Williams v. Gibbes*, 20 How. 535 (1858), approved this rule restricting an account to the time suit is begun where plaintiff places himself within the special circumstances mentioned above. This was a suit to recover the proceeds of the share of plaintiff's intestate in a company which had a claim against the Mexican government, an award having been made under the treaty of 1839. Plaintiff made no claim for his share in the company (originally worth \$2,000, later worth about \$41,000) nor did his representative until the bill was filed. In allowing in the account the costs and fees paid to counsel by defendant executors, the Court cited both *Green v. Biddle*, *supra*, and *Roosevelt v. Post*, *supra*, saying the principle of those cases is applicable "where the person in possession is a bona fide purchaser, and there has been some degree of remissness, or negligence, or inattention, on the part of the true owner, in the assertion of his rights."

It is submitted that the facts of the present case require an application of this rule. For over 100 years the United States had knowledge of the adverse claim and activities of Texas in this area. During this time no protest was made by the United States to the action on the part of Texas, and no claim was made to any of the monies being received by Texas from the area. As shown above, even after the decision in the *California* case, responsible federal officials recognized that Texas' claim to this area might be a valid one. Under such circumstances the

date of the *California* decision, June 23, 1947, is of no significance in determining the period of an accounting by Texas.

It is respectfully submitted, therefore, that the date to be set out in paragraph 3 for the beginning of the accounting period should be June 5, 1950, the date of the opinion in this case, or, in the alternative, May 16, 1949, the date of the filing of the complaint.

**4. Paragraph 3 should clearly state that the existence and extent of Texas' liability, if any, for money received is yet to be determined and should provide the means for such determination.**

Paragraph 3 of the proposed decree would provide that the United States is entitled to an accounting from the State "of all or any part of the sums of money derived by the State from the area . . . which are properly owing to the United States under the opinion entered in this case on June 5, 1950, this decree, and the applicable principles of law."

Plaintiff's memorandum, page 7, apparently interprets the intent and effect of this wording as leaving open, for future agreement of the parties or further proceedings, the determination of the existence and extent of Texas' liability, if any, for money received from the lands in controversy.

If this interpretation of the intent and effect of this part of the proposed paragraph is correct, defendant has no objection thereto, except to suggest that this meaning should be more clearly stated and that a means for such determination should be pro-

vided in the decree in the event the parties cannot agree. To accomplish this purpose, defendant requests the addition of the following sentence to paragraph 3:

"If within 90 days from the entry of this decree, the parties have not agreed upon the existence and extent of any liability claimed by the United States for monies received by Texas, the Court, upon motion of either party, will name a master to make such determination."

Defendant's response to paragraph 3 is based upon its continued assumption that the Court did not by its opinion and will not by this decree make any determination of monetary liability against the State of Texas; that such a determination, being incidental to the principal cause of action, requires future hearings by the Court or a master appointed for that purpose if agreement of the parties is not reached; and that the proper time to raise its defenses to the existence and extent of any monetary liability claimed by plaintiff will be at a hearing held for that purpose.

Respectfully submitted,

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